

New Hampshire Local Government Center

[NHLGC Home](#)
[Back to Index](#)

Dealing with E-mail Communication Under New Hampshire's Right to Know Law

One of the thorniest problems for local officials these days is determining how to deal with e-mail communication under New Hampshire's Right to Know Law. Recommended amendments to the law put forth by the Right to Know Law Study Commission, which became this year's HB 626, would have clarified many of the issues raised by electronic communications. Unfortunately, however, the bill was effectively killed in the Senate, so the legislative clarification long-awaited by local officials did not come to pass. The legislature will probably take up a similar bill again next year, but in the meantime, the current requirements of the Right to Know Law must continue to be applied to e-mail and other electronic communication issues. Here are some guidelines for local boards and officials for making decisions about these issues.

Q. Does a series of e-mail exchanges among a quorum of the membership of a municipal board or committee constitute a "meeting" under the Right to Know Law?

A. Probably, although the answer is not clear under the current law. RSA 91-A:2 requires meetings of public bodies to have notice and be open to the public. If the subject of the e-mail exchange is limited to discussion of the date of the next meeting or even the list of topics that should be included on the meeting agenda, there is probably not a violation of the law. However, if a quorum exchanged messages that discussed the substance of issues, even if final decisions were not made, the board or committee probably has violated the open meeting requirement. After all, the law is based upon the principle that the public has a right to observe its government in action. A substantive discussion via e-mail, even though the members are not participating contemporaneously with each other, fails the open meeting test. The best advice is to avoid such exchanges, and to limit e-mail communications to scheduling of meetings and proposing agenda items.

Q. Is the Right to Know Law's open meeting requirement violated when e-mail messages are exchanged among fewer than a quorum of board members?

A. No. RSA 91-A:2 defines "meeting" as "the convening of a quorum of the membership of a public body[.]" When less than a majority of members communicate with each other regarding substantive issues before the board, there is no "meeting" under the law. One of the major problems with e-mail communication, however, is that messages are easily forwarded to others beyond the original parties. Messages never intended to be shared with a quorum of a board may easily end up reaching all the members, or at least a majority. This is why many municipal officials decline to participate in such exchanges, even though electronic communication has become such a common way of doing business.

Q. Are e-mail exchanges among public officials considered public records under the Right to Know Law?

A. The term "public record" is not specifically defined in the current Right to Know Law. RSA 91-A:4 states that all citizens have a right to inspect all public records of public bodies, unless the record constitutes one of the exemptions described in RSA 91-A:5. It also states that "any body or agency which maintains its records in a computer storage system may, in lieu of providing original documents, provide a printout of any record reasonably described." A message circulated to a quorum of a public body via e-mail is a public record. An e-mail exchange among less than a quorum of the public body is not a public record.

Q. Must paper copies of e-mail communications be kept?

A. This issue is not governed by the Right to Know Law. Instead, the recently amended Municipal Records Disposition Act, RSA 33-A, determines which records must be kept in paper form. Before 2005, the Municipal Records Board issued administrative rules governing the length of time specific types of records were to be kept. The Municipal Records Disposition Act now includes in statute a records retention schedule. The statute lists specific types of records along with the number of years the record must be retained. Records that must be retained for more than 10 years must be transferred to paper, microfilm or both. Records that must be kept for less than 10 years may be retained electronically only, if so approved by the municipality's record committee (does your town have a local record committee, as the law requires?), as long as the municipality assures the accessibility of the records for the required retention period. See RSA 33-A for the important details of the records retention requirements.

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